Gambini v. Total Renal Care Does Not Provide Employees Unconditional Protection from Adverse Employment Actions Based on Disability-Related Conduct

By

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In *Gambini v. Total Renal Care,*[1] the Ninth Circuit Court of Appeals recently held that an employer discriminated against an employee diagnosed with bipolar disorder by firing her because of a violent outburst.[2] During discovery, the employer admitted that one of the reasons it terminated the employee was because she had "frightened her co-workers with her violent outbursts."[3] Because the employee's "violent outbursts"[4] were symptomatic of her disability, bipolar disorder, the court reasoned that the employee was terminated because of her disability.[5] The court asserted that a decision motivated even in part by a disability is tainted and entitles a jury to find that an employer violated the Americans with Disabilities Act[6] (the ADA) and state law counterparts, such as California's Fair Employment and Housing Act[7] (the FEHA).[8] wTIATED ICNDC T RETING FR A DIAIIT

The Ninth Circuit's interpretation of disability discrimination law is consistent with both the ADA[9] and the FEHA[10]. 42 U.S.C. § 12112(a) prohibits employers from "…discriminat[ing] against a qualified individual with a disability *because of the disability* of such individual (*emphasis added*)."[11] CAL. GOV'T. CODE § 12940(a) of the FEHA deems it "unlawful employment practice…*for disability* to bar or to discharge…or

to discriminate against the person (*emphasis added*)."[12] The Ninth Circuit accordingly applied the plain language of the ADA and applicable state regulation as they are written according to their ordinary meaning[13] by interpreting that "conduct resulting from a disability is part of the disability and not a separate basis for termination."[14] The court explained that "if the law fails to protect the manifestations of [employee's] disability, there is no real protection in the law because it would protect the disabled in name only."[15]

For purposes of the ADA, with a few exceptions[16], the Ninth Circuit[17] considers conduct resulting from a disability to be part of the disability, rather than a separate basis for termination.[18] In *Kimbro v. Atalntic Richfield Co.*[19], the court held that excessive absenteeism caused by an employee's failure to arrive at work *because of* his migraine headaches was discrimination.[20] In *Humphrey v. Memorial Hospitals Association*[21] it held that termination for absenteeism is discrimination if the absenteeism was *caused by* a disability of Obsessive Compulsive Disorder (OCD).[22] In *Dark v. Curry*[23] the court held that termination for operating a truck and heavy equipment while ignoring an epileptic aura was discrimination because the employee's "misconduct" *resulted from* his disability of epilepsy.[24] The court in *Gambini* relied upon a district court decision in *Riehl v. Foodmaker, Inc.*[25] in which the Washington Supreme Court found that termination based on a personality change *after an employee developed* Post Traumatic Stress Disorder (PTSD) was discrimination due to the disability of PTSD.[26] The Ninth Circuit further clarifies that a valid nondiscriminatory explain must disclaim *any* reliance on the employee's disability in having taken the employment action, even if the employer claims additional reasons for the action.[27]

Ninth Circuit cases make it clear that employers are obligated to engage in an "interactive process" to determine whether a reasonable accommodation can be made.[28] The term "interactive process" derives not from the ADA plain language itself but from federal regulations formulated by the Equal Employment Opportunity Commission (EEOC). The EEOC Interpretive Guide 29 C.F.R § 1630.2(o)(3) the EEOC provides:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation.[29]

Although the ADA does not explicitly state that the "interactive process is necessary", the Ninth Circuit in *Barnett v. U.S. Air Inc.*[30] interpreted the regulation as a warning to employers that a failure to engage in an interactive process might expose them to liability for failing to make reasonable accommodation due to the employers' obligation to "make a reasonable effort to determine the appropriate accommodation."[31] Under the FEHA, an employer's failure to provide reasonable accommodation to enable an employee with a disability to perform the essential functions of his job constitutes an unlawful employment practice.[32] Thus, the failure of the employer to engage in an interactive process to determine whether reasonable accommodation[33] is evidence that the employer might have acted in bad faith under the ADA[34] and a violation of the statute under the FEHA.[35]

II. SHIELDING MISCONDUCT RESULTING FROM A DISABILITY DOES NOT PREVENT EMPLOYERS FROM REGULATING WORKPLACE CONDUCT

A close reading of *Gambini* explains that having a disability doesn't give employees a "get out of jail free card" just because their misconduct is disability related[36]. Employers are not liable for employee disabilities and needs for

accommodation when an employer is unaware.[37] Once engaged in the interactive process, employers may raise an "undue burden", "direct threat" or business necessity defense if a reasonable accommodation is not available.[38] Last, the Ninth Circuit makes clear that employers do not need to tolerate egregious or criminal conduct[39] or employees who engage in misconduct due to alcohol or drug abuse on the job.

Employers are also not held liable for disciplining misconduct because of a disability if they were not made aware of the disability nor that it needed accommodation.[40] The EEOC asserts that it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."[41] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions. An employee whose disability is not apparent is therefore obliged to tender a specific request for a necessary accommodation.[42] The employee in *Gambini* had informed her supervisors about her condition and kept them apprised of her medication issues and the various accommodations she thought might reduce the chances of an outburst at work[43]. However, an employer availed a FEHA pretext accusation, in the recent Ninth Circuit case *King v. United Parcel Services, Inc.,*[44] by proving that the employee did not communicate his distress to his supervisors or make any kind of specific request for a modified work schedule required to trigger an employer's duty to provide accommodation.[45]

The Ninth Circuit further clarified that under the ADA and FEHA the employer would still be entitled to raise a "business necessity"[46], "direct threat"[47] or "undue burden[48]" defense concluded after engaging in the "interactive process" with employee

that established that they are "qualified individual with a disability[49]". The Ninth Circuit clarifies in *Gambini* that the "heart of [employer's] defense was its claim that employer 'lost her job because of misconduct'" rather than pursue a defense on any of these theories.[50] Convenient for the employer, utilizing an appropriate interactive process to identify and implement reasonable accommodations for potentially disabled employees is already engaging in exactly the sort of "individualized assessment" required to assert the "direct threat" defense.[51]

Last, employers can discipline employees for misconduct arising from alcohol or drug abuse, as well as egregious or criminal conduct. Misconduct due to drugs and alcohol are explicit exclusions from ADA and FEHA protection[52]. Under the ADA an employer "may hold an employee who engages in the illegal use of drugs to who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if an unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee."[53] (Insert California law here). In 1996, the Ninth Circuit in *Collings v. Longview Fibre Co.*[54] allowed employers to discharge for drug-related misconducts on the worksite regardless of their disability or perceived disability as a drug addict or dependent.[55] A California Appellate Court held in *Gonzalez v. State Personnel Board*[56] misconduct relating to alcoholism disqualified an employee from protection of both state and federal disability states, rending it unnecessary reasonably to accommodate his disability. [57] The Ninth Circuit in *Newland v. Dalton* the Ninth Circuit suggested that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is

alcohol or drug-related.[58] However, neither of these exceptions applied to the employee in *Gambini's* mental condition.[59]

III. CONCLUSION

Employers do not need to compromise workplace conduct standards to comply with the ADA and the FEHA. If an employer becomes aware that an employee has a qualified disability they must simply engage in the interactive process to determine whether a reasonable accommodation can be made. The employer can determine an accommodation would cause "undue hardship", that the employee posed a "direct threat" or that the adverse employment action was due to "business necessity". The employer is not required to tolerate drug and alcohol abuse or criminal or egregious conduct. Although disability discrimination law in the Ninth Circuit affords disabled employees significant protections, these protections are by no means absolute.

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[1] *See* Gambini v. Total Renal Care, No.05-35209, 2007 WL 1191929 (9th Cir. April 24, 2007).

[2] *Id.* at *7.

[3] *Id.*

[4] During a meeting discussing employee's performance, employee "threw the performance plan across the desk and in a flourish of several profanities expressed her opinion that it was both unfair and unwarranted. Before slamming the door on her way out, [employee] hurled several profanities at her supervisor…employee kick[ed] and thr[ew] things at her cubicle after the meeting." The employer classified employee's behavior as "violent outbursts". *Id.* at *7.

[5] *Id.*

[6] 42 US.C. §§ 12101-12117, 12201-12213.

[7] CAL. GOV'T. CODE § 12900 et seq.

[8] *See Gambini v. Total Renal Care*, 2007 WL 1191929 at *7.

[9] 42 U.S.C. § 12112(a).

[10] CAL. GOV'T. CODE § 12940(a).

[11] 42 U.S.C. § 12112(a).

[12] CAL. GOV'T. CODE § 12940(a).

[13] "The courts have adopted a regular method for interpretation the meaning of language in a statute: first, find the ordinary meaning of the language in it textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not – and especially if a good reason for the ordinary meaning appears plain – we *apply that ordinary meaning (emphasis added).*" *See Chimsom v. Roemer* (1991) 501 U.S. 380, 404.

(dis.opn. of Scalia, J.), *quoted in Bagatti v. Department of Rehabilitation*, 97 Cal.App.4th 344, 363 (Cal.App. 3 Dist. 2002).
[14] Gambini v. Total Renal Care, 2007 WL 1191929 at *7.
[15] *Id., citing School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 279 (1987); see also EEOC guidance (get citation for this) and purpose of statute (get citation for this). The Ninth Circuit's statutory interpretation is consistent with the method that Justice Scalia asserts the courts have adopted. *See supra* note 12.
[16] *See Infra* note 52-58.
[17] *See also Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir. 1997) (holding that the Tenth Circuit considers conduct resulting from a disability to be part of the disability, rather than a separate basis for termination).
[18] Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 at 1140.
[19] Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 875 (9th Cir. 1989).
[20] *Id.*
[21] *Humphrey v. Memorial Hospitals Association*, 239 F.3d at 1140.
[22] *Id*.
[23] Dark v. Curry County, 451 F.3d 1078, 1084 (9th Cir.2006).
[24] *Id.*
[25] Riehl v. Foodmaker, Inc., 152 Wash.2d 138 (Wash. 2004).
[26] *Id.*
[27] *Dark v. Curry County*, 451 F.3d at 1084.
[28] See *Dark v. Curry County*, 451 F.3d at 1087 (holding that because the employer did not engage in any such the interactive process, summary judgment is available only if a reasonable finder of fact *must* conclude that "there would in any event have been no reasonable accommodation available."); *See also Allen v. Pacific Bell*, 348 F.3d 1113, 1115 (9th Cir.2003) (per curiam) (citing *Humphrey v. Memorial Hospitals Association*, 239 F.3d at 1137-39); (explaining that summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith); *Nunes v. Walmart Stores, Inc.*,164 F.3d at 1243, 1248-49 (9th.Cir 1999) (reversing summary judgment because, *inter alia*, "the record contains no evidence that[the employer] considered any at-work accommodations to reduce the risks it feared"); *see also* EEOC Interpretive Guide 29 C.F.R. §1630.2(o)(3).
[29] EEOC Interpretive Guide 29 C.F.R § 1630.2(o)(3).
[30] Barnett v. U.S. Air Inc., 297 F.3d 1106, 1110 (9th.Cir. 2002).
[31] *Id.*
[32] CAL. GOV'T. CODE § 12940(m); King v. United Parcel Service, Inc., -- Cal.Rptr.3d --. 2007 WL 1493316 (Cal.App. 3 Dist. May 23, 2007); Spitzer v. Good Guys, Inc. 80 Cal.App.4th 1376, 1383 (Cal.App.4th 2000).
[33] CAL. GOV'T. CODE § 12940(m),(n); CAL.CODE REGS., tit.2, § 7293.9.
[34] Walsted v. Woodsbury County, Iowa, 113 F.Supp.2d 1318, 1336 (N.D.Iowa 2000).
[35] *King v. United Parcel Service, Inc*., 2007 WL 1493316, at *10 *citing* Jensen v. Wells Fargo Bank (2000) 85 Cal.App.4th 245, 25.
[36] *See Gambini v. Total Renal Care*, No.05-35209, 2007 WL 1191929, at *8 (9th Cir. April 24, 2007).
[37] *See infra* note 40.
[38] *See Gambini v. Total Renal Care*, 2007 WL 1191929, at *8.
[39] See *infra* note 58.
[40] *See King v. United Parcel Service, Inc*., -- Cal.Rptr.3d --. 2007 WL 1493316, at *10 (Cal.App. 3 Dist. 2007); *but see Walsted v. Woodsbury County, Iowa*, 113 F.Supp.2d at 1336.

> In general it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. However, the court is also mindful that the ADA does not require clairvoyance. However, if an employee's disability and the need to accommodate it are obvious, an employee is not required to expressly request reasonable accommodation.

[41] EEOC Interpretive Guide, 29 C.F.R. § 1630.9 App. (1999).
[42] *Id.*
[43] *See Gambini v. Total Renal Care*, 2007 WL 1191929, at *8.
[44] *King v. United Parcel Service, Inc*., 2007 WL 1493316, at *10.
[45] *Id.*
[46] See 42 U.S.C. § 12113(a)-(b).

[47] *See* EEOC Interpretive Guide 29 CFR § 1630.15(b)(2) (2001) (The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace"); 42 U.S.C. § 12113(b).
[48] *See* EEOC Interpretive Guide 29 C.F.R. § 1630.2(p) (stating factors to be considered when determining whether an accommodation would impose an undue hardship); 42 U.S.C. § 12111(10).
[49] *See Gambini v. Total Renal Care*, 2007 WL 1191929 at *8.
[50] *Id*.
[51] See *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023 (9th Cir. 2003) (Employers have an affirmative obligation to make an "individualized assessment" as to whether to exclude an individual from the workplace as a "direct threat" within the meaning of the ADA)
[52] *See* 42 § U.S.C. 12114(b)(1),(2) (if an individual has completed a supervised drug or alcohol rehabilitation program or has otherwise been rehabilitated successfully, the person would be considered a "qualified individual with a disability"); see Zenor v. El Paso Healthcare System, Ltd. 176 F.3d 847, 856 (5th Cir. 1999) (holding that "drug use must be sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem"); *see also* infra note 56.
[53] 42 U.S.C § 12114(a).
[54] Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995).
[55] *Id.;* EEOC Interpretive Guide 29 C.F.R. Section 1630.3 App; *see also* Section 12114(a).
[56] Gonzalez v. State Personnel Board, 33 Cal.App.4th 422 (Cal.App.3.Dist. 1995).
[57] *Id.*
[58] *Newland v. Dalton*, 81 F.3d. 904, 906 (9th Cir.1995) (holding that an employer may fire an employee who went on a "drunken rampage" and attempted to fire an assault rifle at individuals in a bar.); *see also Shutts v. Bentley Nevada Corp*, 966 F.Supp. 1549, 1555 (D.Nev. 1997) (denying employee's claim that an assault on a supervisor was a product of his depression and therefore being fired for his job for the assault was disability discrimination")
[59] *Humphrey v. Memorial Hospitals Association*, 239 F.3d at n.18; See also *Walsted v. Woodsbury County, Iowa*, 113 F.Supp.2d at 1336 (N.D.Iowa 2000) ("To extrapolate from 12114(c)(4) and 12114(a) that all disability-caused misconduct, regardless of whether or not the disability is related to alcoholism or illegal drug use, is not protected under the ADA and would in this court's opinion effectively undermine the purpose of the ADA. Rather the language of the ADA, its statutory structure.")